No. 83-491

In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND ELIAS SANDOVAL-SANCHEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-94a) is reported at 705 F.2d 1059. The opinions of the Board of Immigration Appeals and the immigration judges (Pet. App. 97a-116a) are not reported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 95a, 96a) were entered on April 25, 1983. On July 15, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 22, 1983. The petition was filed on that date and was granted on January 9, 1984 (J.A. 203). The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents sought to avoid deportation on the ground that their admissions of illegal alienage, which were used

against them at their deportation hearings, were the fruits of unlawful arrests and should have been suppressed. On petitions for review of their deportation orders (consolidated by the court of appeals), the Ninth Circuit held, in a seven to four decision,[1] that the exclusionary rule applies in civil deportation proceedings. Concluding that respondent Sandoval-Sanchez had been arrested in violation of the Fourth Amendment and that the only evidence supporting his deportability had been obtained as a result of the unlawful arrest, the court of appeals suppressed that evidence and reversed Sandoval's order of deportation. Because the legality of respondent Lopez-Mendoza's arrest had not been determined in the administrative deportation proceedings, the court vacated the deportation order against him and remanded his case to the Board of Immigration Appeals for determination of the Fourth Amendment issue.

1. Respondent Lopez was arrested in 1976 by Immigration and Naturalization Service (INS) agents at his place of employment in San Mateo, California. The investigators had received a tip about the employment of illegal aliens there (J.A. 15-16), and they went to that location, which appeared to be a transmission repair shop (J.A. 17), for the purpose of interviewing the persons named by the informant (J.A. 18, 23, 28-29). They arrived shortly before 8:00 a.m. (J.A. 54). One agent approached the proprietor and stated the purpose of their visit (J.A. 18). The proprietor would not allow his employees to be interviewed during working hours, and he suggested that the agents return during the lunch hour (J.A. 41). The agents knew from experience, however, that if they left the shop, no illegal aliens would be there when they returned (J.A. 35-36, 52).

To avoid a confrontation with the proprietor, one agent approached Lopez, who was standing some distance away

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[1] The court decided sua sponte to hear the cases before an en banc panel. See Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit.

(J.A. 23). The agent first identified himself in English but received no response. The agent then identified himself in Spanish, inquired where Lopez was from, how he had entered the United States, whether he had papers, and whether he had any family in this country (J.A. 20, 36). Lopez answered the questions voluntarily (J.A. 37, 45). Had he refused to answer, the agent simply would have terminated the interview (*ibid.*). Lopez's answers disclosed that he was an undocumented alien with no family ties in this country (J.A. 20-21, 28).[2] Because of his lack of family ties and the consequent risk of his absconding, Lopez was taken into custody as an illegal alien (J.A. 28). Subsequently, Lopez executed an affidavit admitting his Mexican nationality and his illegal entry into this country (J.A. 99-101).

On the basis of Lopez's admissions, the immigration judge found him deportable, but granted him the privilege of voluntary departure (Pet. App. 99a).[3] The immigration judge found it unnecessary to pass on Lopez's claim that he had been unlawfully arrested, stating that "the mere fact of an illegal arrest has no bearing on subsequent deportation proceedings" (*id.* at 98a).

The Board of Immigration Appeals (BIA or Board)[4] dismissed Lopez's appeal (Pet. App. 100a-103a), concluding that Lopez's claim that he had been illegally arrested was irrelevant (*id.* at 102a):

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[2] The information provided by Lopez was memorialized in a document called a "Record of Deportable Alien" (Form I-213), which was introduced into evidence before the immigration judge (Pet. App. 101a).

[3] By accepting "voluntary" departure, an alien is relieved of the legal constraints that attend any attempted lawful reentry by one who has been previously deported. See 8 U.S.C. 1182(a)(17) (aliens who have been deported are "ineligible to receive visas and shall be excluded from admission into the United States").

[4] The BIA is an agency of the Department of Justice that is separate from the INS. See 8 C.F.R. 3.1. The Board exercises powers delegated by the Attorney General, who retains discretionary authority to review its decisions. See 8 C.F.R. 3.1(h).

> We reject the notion that an unlawful arrest can somehow transform an alien's unlawful presence in the United States into a right to remain.

The Board also rejected Lopez's claim for invocation of the exclusionary rule, noting that it had thoroughly considered that issue in a prior case (*Matter of Sandoval*, 17 I. & N. Dec. 70 (BIA 1979) (J.A. 163-202))[5] and had there concluded (Pet. App. 102a-103a):

> [A]doption of the [exclusionary] rule in deportation proceedings would [not] offer any significant deterrent to misconduct to an immigration officer who would otherwise intentionally violate an individual's Fourth Amendment rights in the hope of assisting in that alien's deportation. * * * [T]he potential benefit of the rule does not justify the societal cost of its application and * * * other means of deterring immigration officers from unlawful conduct are available.

2. Respondent Sandoval was arrested in 1977 at his place of employment, a potato processing plant in Pasco, Washington.[6] INS Agent Bower and other officers went to the plant, with the permission of its personnel manager, to check for illegal aliens (J.A. 127, 137). While some of the officers stationed themselves at the exits, Bower and a uniformed Border Patrol agent entered the plant (J.A. 128). Because a shift change was occurring, they went first to the lunchroom, then through the plant area, and finally to the main entrance (J.A. 128, 129). As soon as they entered the lunchroom, they identified themselves as immigration officers (J.A. 133). Their appearance caused confusion—many people in the lunchroom rose and either headed for the exits or milled around; others in the plant area left their equipment and

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[5] For convenience, the Board's decision in *Matter of Sandoval*, *supra*, is reproduced in the Joint Appendix at pages 163-202.

[6] Respondent Sandoval is not the same individual who was involved in *Matter of Sandoval*, *supra*, in which the Board held the exclusionary rule ordinarily inapplicable to deportation proceedings.

started running; and many of those who were entering the plant turned around and started walking back out (J.A. 129-130).

The two officers eventually stationed themselves at the main entrance to the plant. As employees passed, the officers looked for those who averted their heads, avoided eye contact, or tried to hide themselves in a group. They addressed those individuals in English, with innocuous questions. The conversations were terminated if the individuals responded in English. Those who could not respond in English and who by their actions aroused Agent Bower's suspicions, based on his experience as an immigration investigator, were questioned in Spanish as to their right to be in the United States. J.A. 133-134.

Agent Bower testified that it was "very probable" that he, and not his partner, had questioned Sandoval at the plant, but that he could not be "absolutely positive" (J.A. 135, 136). The alien whom he thought he remembered as Sandoval had been "very evasive"—the individual had averted his head, turned around, and walked away when he saw Agent Bower (J.A. 137, 138). Agent Bower was certain that no one was questioned about his status unless his actions had given the officers reason to believe that he was an undocumented alien (J.A. 140).

Thirty-seven illegal aliens, including Sandoval, were briefly detained at the plant and later transported to the county jail for processing (J.A. 129, 131). At the jail, about one-third of the aliens availed themselves of the privilege of voluntary departure, and they were immediately put on a bus to Mexico (J.A. 141). Those, including Sandoval, who elected to exercise their right to a deportation hearing were questioned further. During this questioning, Agent Bower reduced to writing (on a Form I-213) Sandoval's admission of unlawful entry (Pet. App. 6a).

Based on the written record of Sandoval's admissions, the immigration judge found him deportable (Pet. App. 104a-109a). The immigration judge considered and re-

jected Sandoval's claim that he had been unlawfully arrested and, in the alternative, held that an illegal arrest "does not tend to negate the validity of a deportation hearing" (*id.* at 107a, 108a). Despite the fact that this was Sandoval's second entry without inspection, the immigration judge, as a matter of administrative discretion, granted his alternative request for voluntary departure (*id.* at 108a-109a).

The BIA dismissed Sandoval's appeal (Pet. App. 110a-113a). Reviewing the entire record, including Sandoval's own testimony, the Board concluded that the circumstances of his arrest had not affected the voluntariness of his recorded admission (*id.* at 112a). The Board also again declined to invoke the exclusionary rule (*id.* at 112a-113a).

3. The court of appeals reversed Sandoval's deportation order and vacated and remanded Lopez's deportation order (Pet. App. 1a-94a). Six members of the panel, in an opinion written by Judge Norris, held that Sandoval's admission was the fruit of an unlawful arrest and that the exclusionary rule, which was held applicable to deportation proceedings, required suppression of the evidence (Pet. App. 1a-37a). Judge Goodwin, in a special concurring opinion (*id.* at 38a), agreed that, "for better or for worse," the exclusionary rule applies to deportation proceedings, but noted that he joined in the finding of a Fourth Amendment violation in Sandoval's case only "[u]nder the compulsion of *Intern. Ladies' Garment Workers', Etc. v. Sureck*, 681 F.2d 624 (9th Cir. 1982), which is the law of this circuit, but with which I disagreed * * *."[7] Lopez's deportation order was vacated

[7] The majority, citing *International Ladies Garment Workers' Union* v. *Sureck*, 681 F.2d 624, 634-643 (9th Cir. 1982), cert. granted *sub nom. INS* v. *Delgado*, No. 82-1271 (Apr. 25, 1983) (argued Jan. 11, 1984), and noting that "Officer Bower could not remember Sandoval or describe his behavior" (Pet. App. 7a), questioned whether there was "the requisite individualized suspicion of illegal alienage to justify even a brief *Terry* stop of Sandoval" (*ibid.*). Nevertheless, the majority did not decide that issue, con-

and his case remanded to the BIA to determine whether there had been a Fourth Amendment violation.

Adopting the analytical framework set forth in *United States* v. *Janis*, 428 U.S. 433 (1976), the majority concluded that the benefits of applying the exclusionary rule in civil deportation proceedings out-weighed the costs. On the "benefit" side, the majority opined that the "deterrent impact of invoking the rule in deportation proceedings will be 'substantial and efficient' " (Pet. App. 25a (footnote omitted) (quoting *Janis*, 428 U.S. at 453)) because the allegedly illegal evidence is used by the same agency whose officers obtain it and because "there are no other applications of the exclusionary rule which effectively deter the offending officers from violating the Fourth Amendment"—for example, reliance on the deterrence that could be obtained by suppressing evidence only in criminal immigration prosecutions was thought to be inadequate because the evidence was not likely to have been obtained with such criminal prosecutions in mind. Pet. App. 22a-24a. The majority also rejected *Bivens* ac-

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cluding instead that "the dispositive question is * * * the lawfulness of [Sandoval's] detention at the time he was interrogated at the jail" (*ibid.*). The court held that by the time of Sandoval's interrogation at the police station, "the initial stop had clearly ripened into an arrest" (*ibid.*) and that the "furtive behavior" observed by Agent Bower (which the court treated as the only basis for the officer's decision to detain Sandoval) constituted insufficient probable cause to support an arrest (*id.* at 8a).

In his special concurring opinion, Judge Goodwin noted simply that he did "not believe that a 'Terry Stop' in a work place where the immigration officers have a right to be necessarily ripens into an unlawful seizure on the facts of this case" (Pet. App. 38a).

In a special dissenting opinion, Judge Poole argued that probable cause was established when, after being questioned in Spanish, the suspected aliens "answered and conceded alienage and also illegal entry" (Pet. App. 92a). Judge Poole also noted that the "record as a whole shows that all of the persons to whom questions were addressed first in English and then in Spanish had exhibited some behavior which preceded the questioning," that Sandoval "was among those asked in Spanish whether 'they had papers' " and that "[h]e had none" (*ibid.*).

tions, injunctive relief, and internal agency discipline, finding them inadequate alternatives to application of the exclusionary rule (Pet. App. 33a-35a).

On the other side of the balance, the majority found the societal costs of suppression to be negligible. It opined that the only real cost to be considered was the number of illegal aliens who will successfully avoid deportation and concluded that that number "will not appreciably increase the number of illegal aliens in our midst" (Pet. App. 27a).

Judge Alarcon, joined by Judges Wright, Wallace, and Poole, dissented from the majority's holding on the exclusionary rule issue (Pet. App. 39a-85a). Judge Wright also wrote a separate opinion specially concurring in the principal dissenting opinion (*id.* at 86a-90a), and, as previously noted (see page 7 note 7, *supra*), Judge Poole separately dissented from the majority's conclusion that Sandoval had been unlawfully arrested (Pet. App. 91a-94a).

On the exclusionary rule issue, the principal dissent argued that there was nothing in the record "from which it can be reasonably inferred that immigration officers routinely conduct unreasonable searches and seizures," nor were there "any facts that would support an inference that extending the exclusionary rule to civil deportation proceedings would act as a significant deterrent to present INS practices" (Pet. App. 46a). Hence, the dissent was of the view that the court had "created a remedy for which there is no demonstrated need" (*ibid.*).[8] Judge Wright, in his separate dissent, was willing to assume that there might "be a deterrent effect if the rule

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[8] The dissent also accused the majority of reaching "out beyond the record" because "neither [respondent] timely moved to suppress evidence on fourth amendment grounds" (Pet. App. 45a). The majority held, however, that respondents' motions to "terminate" their deportation proceedings should be treated as motions to suppress (*id.* at 2a-3a n.1). We have not sought review of the majority's conclusion that respondents made at least the functional equivalent of suppression motions in these cases.

were applied in deportation proceedings because these proceedings are within immigration officers' zone of primary interest" (*id.* at 87a). After noting the costs associated with the exclusionary rule, however, he expressed the view that "[t]hese are not cases in which the manner of seizing evidence was so egregious as to call for the deterrent impact of the rule" (*id.* at 89a).

On the cost side, the principal dissent noted that, under the "fruit of the poisonous tree" concept, suppression could well immunize an alien perpetually from deportation despite his continuing violation of the immigration laws (Pet. App. 48a-49a). Moreover, requiring suppression hearings in deportation proceedings "could result in protracted interruption of the proceedings, and may seriously impede enforcement of our nation's immigration laws" (*id.* at 72a). Thus, the dissent took issue with the majority's decision to limit its consideration of the costs of applying the exclusionary rule in deportation proceedings to the additional number of illegal aliens that might be expected to escape deportation (*id.* at 74a-75a):

> The impact of the rule on deportation proceedings is not so much that the illegal alien population will increase—indeed it does so every year despite heightened enforcement policies. Rather, the impact of the rule on civil deportation proceedings must be measured against the number of motions to suppress that will be made—not the number of constitutional challenges that are meritorious. This is the potential injury to the deportation proceeding that must be weighed in the balancing process.

The dissent then concluded that this cost would be excessive (Pet. App. 77a). Finally, the dissent was of the view that INS's stringent procedures for disciplining officers who conduct illegal searches and seizures made application of the exclusionary rule to deportation proceedings unnecessary (*id.* at 78a-82a).

INTRODUCTION AND SUMMARY OF ARGUMENT

By extending the exclusionary rule to civil deportation proceedings, convened solely for the purpose of determining whether an alien has the right to be in the United States, the court of appeals has sanctioned a continuing violation of the law by freeing an illegal alien and allowing him to perpetuate his unlawful presence in this country. This licensing of continuing unlawful conduct is unparalleled in our jurisprudence, for although the suppression of evidence in a criminal prosecution often amounts to a grant of immunity for *past* criminal conduct, so too does the expiration of a statute of limitations, the granting of a pardon, or the granting of immunity by a prosecutor. But it is unprecedented for the judiciary to create rules of evidence or procedure that directly facilitate the commission of *continuing* unlawful conduct.

The reversal of respondent Sandoval's deportation order, moreover, does more than simply offend society's notions of justice and judicial integrity. The court of appeals' extension of the exclusionary rule to civil deportation proceedings will have severe practical effects: It threatens grave injury to the enforcement of our immigration laws and may create a new class of aliens whose only documentation is a judge's opinion suppressing evidence—and it does so at a time when the Legislative and Executive Branches are attempting to regain control over the nation's borders and stem the flood of aliens unlawfully entering and residing in the United States.

The suppression rule, after all, is not constitutionally mandated, but is a judicially created remedy designed to deter unlawful police conduct. See, *e.g.*, *United States* v. *Calandra*, 414 U.S. 338, 347-348 (1974). The determinative question, therefore, is not whether the protections of the Fourth Amendment extend to deportable aliens discovered in this country—a proposition we do not contest—but whether it is appropriate to permit illegal aliens to invoke the exclusionary rule in civil deportation proceedings in order to perpetuate their unlawful presence in the

United States. We submit that it is not, and that this Court should dismantle the Ninth Circuit's new "barrier[] to law enforcement [created] in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." *United States* v. *Janis*, 428 U.S. 433, 459 (1976).

A. Not since *Mapp* v. *Ohio*, 367 U.S. 643 (1961), has this Court extended the exclusionary rule to an entirely new category of cases. It is well to bear in mind, however, that there are certain fundamental distinctions between the situation confronting the Court in *Mapp* and the cases now before the Court. The decision in *Mapp* was reached essentially as a matter of last resort, only after the Court concluded, based on the experience of the states in the years following *Wolf* v. *Colorado*, 338 U.S. 25 (1949), that less drastic remedies had failed. Here, by way of contrast, there is neither evidence of widespread Fourth Amendment violations by immigration officers nor any indication that those occasional violations that do occur can be materially reduced by addition of the suppression sanction to the array of alternative training and deterrent mechanisms already in place. Moreover, the Court's task in assessing the efficacy of the alternative deterrents is greatly simplified here, where it is the activities of a single federal agency, rather than those of every state and local police department in the country, that are under scrutiny. The available evidence indicates that INS already is taking all reasonable measures to ensure compliance by its officers with the Fourth Amendment and that the additional sanction of the exclusionary rule is neither needed nor likely to provide a measurable increment of deterrence.

B. Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials, let alone administrative deportation hearings. Instead, decisions of this Court over the last two decades have made it clear that the exclusionary rule,

first enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1914), and later extended to the states in *Mapp*, is a judicially-created remedy, the paramount and perhaps sole purpose of which is the deterrence of unlawful police conduct. See, *e.g.*, *Calandra*, 414 U.S. at 348; *Desist* v. *United States*, 394 U.S. 244, 254 n.24 (1969). For that reason, the Court has recognized that it makes sense to apply the rule only to those situations in which its deterrent purpose will in fact be significantly advanced. *Calandra*, 414 U.S. at 348.

Although the nature of the proceeding is not the controlling inquiry, it is certainly relevant, in undertaking a cost-benefit analysis of the exclusionary rule's applicability to deportation proceedings, to bear in mind that "[i]n the complex and turbulent history of the rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state." *Janis*, 428 U.S. at 447 (footnote omitted). This is so because the need for deterrence, and hence the rationale for the rule, is strongest in criminal cases. See *Calandra*, 414 U.S. at 348. Deportation proceedings, although they carry important consequences, have always been regarded as civil matters. Their sole purpose is to determine an alien's right to remain in this country, not to punish for the commission of a crime.

C. In our submission, a reasoned cost-benefit analysis demonstrates that the court of appeals erred in extending the exclusionary rule to civil deportation proceedings. Preliminarily, however, we suggest that this is a situation ill-suited to a strictly even-handed weighing of costs and benefits. By excluding unquestionably relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we demand of other rules of evidence. Thus, its benefits should not simply be presumed; they must, instead, be convincingly demonstrated if they are to overcome the indisputable costs. Accordingly, the exclusionary rule cannot rationally be extended to deportation proceedings on the basis of nothing more than speculation that it *might* produce some benefit.

Such drastic medicine must be reserved for cases in which it is demonstrably likely to satisfy a proven need.

D. The societal costs of extending the exclusionary rule to deportation proceedings are excessive. First, the exclusion of oral admissions of alienage is likely to result in a de facto grant of resident status and immunity from the immigration laws to persons not entitled to be in this country. Because the vast majority of deportable aliens enter this country without inspection, it is highly unlikely that INS will have in its files other, untainted evidence sufficient to support a finding of deportability. In these circumstances, INS may never be able to proceed against an alien who has once reaped the windfall benefits of suppression. In practical effect, therefore, the court of appeals' decision is akin to judicial sanction for the suppression of an alien's "body," a result this Court has unequivocally rejected in the criminal context. See *United States* v. *Crews*, 445 U.S. 463 (1980).

Second, application of the exclusionary rule to deportation proceedings carries heavy systemic costs that threaten to bring the administrative and judicial deportation process to a virtual halt. The staggering workload of the immigration judges is manageable only because deportability is usually conceded. But the windfall benefits of suppression, resulting in the termination of deportation proceedings, cannot help but serve as an irresistible incentive to raise suppression motions, whether meritorious or not. The longer an alien can delay his departure from this country, the more likely it is that he may never be forced to leave. Thus, proceedings that are intended to be essentially summary in nature will now involve complex constitutional questions that befuddle even the most experienced jurists. It is manifest that the deportation process cannot cope with such a radical change absent a massive infusion of additional resources.

Finally, proper enforcement of the immigration laws would be severely hampered by the decision below. Effective immigration enforcement requires deployment of the limited available personnel in a manner that is likely to

produce nearly simultaneous arrests of relatively large numbers of individuals, such as those resulting from factory or farm surveys. Officers conducting such arrests cannot realistically be expected to maintain the type of detailed, individualized records that are routine in the criminal field. Although the officers can testify that they followed certain procedures, they generally will be unable to recall in detail the specifics of any particular arrest or group of arrests—as demonstrated by Agent Bower's testimony regarding the apprehension of respondent Sandoval. To avoid suppression of the only evidence supporting deportability, INS agents, no matter how scrupulously they have adhered to the dictates of the Fourth Amendment, will thus be compelled to adopt investigative and record-keeping methods that will enable them to provide detailed, individualized testimony at subsequent suppression hearings. In addition, a considerable portion of each officer's time will have to be devoted to attendance at suppression hearings rather than field operations. Inevitably, these changed procedures will severely reduce the number of arrests that can be made, even though the lawfulness of the general investigative operations is not in question.

E. The exclusionary rule's ability to deter unlawful police conduct has always been a matter of conjecture—intuitively plausible in the context of criminal investigative activities, but nevertheless unproven. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. 465, 492 & n.32 (1976); *Janis*, 428 U.S. at 449-453; *Elkins* v. *United States*, 364 U.S. 206, 218 (1960). Because the rule's effectiveness is a matter of speculation, there is no justification for applying it to a whole new class of proceedings in the absence of both a proven pattern of abuse requiring such a drastic "remedy" and a comparably strong "intuitive" basis for supposing that it will afford a meaningful increment of deterrence of unlawful conduct. The court of appeals was forced to acknowledge, however, that there is no evidence of widespread Fourth Amendment violations by immigration officers (Pet. App. 28a). Thus, as the dis-

sent complained, the court of appeals "has created a remedy for which there is no demonstrated need" (*id.* at 46a).

The cases before the Court highlight another serious problem that is likely to sap the deterrent sanction of much of its potential force. There is no evidence in either case that the alien was in fact subjected to an illegal seizure. The illegality in respondent Sandoval's case, for instance, was simply presumed on the basis of Agent Bower's inability to remember with certainty the details of the encounter. But application of the exclusionary rule to conduct that was probably *lawful* is hardly likely to contribute significantly to the deterrence of illegal conduct.

Moreover, it is unrealistic to suppose that immigration officers will be particularly responsive to the suppression sanction. Such officers typically arrest hundreds of deportable aliens each year and are not likely to be greatly influenced by the possibility that one or even several of their arrests might be held unlawful and thereby block deportation; their "investment" in any particular case pales in comparison to what might be expected of police officers conducting criminal investigations, who may make five or ten arrests per year. In addition, the disincentive to illegal conduct that can be anticipated from the suppression remedy is greatly diluted in the immigration context, because the officer knows in advance that most apprehended aliens will in any event accept voluntary departure rather than challenge their arrest. In these circumstances, an immigration officer is likely to be far more responsive to internal constraints, such as disciplinary sanctions, than to the possible suppression of evidence.

F. Finally, the court of appeals gave insufficient weight to the existing, and apparently quite successful, means of curbing Fourth Amendment violations by INS officers: thorough training in the requirements of the Fourth Amendment, an administrative practice of excluding evidence seized through intentionally or flagrantly unlawful

conduct, comprehensive and effective internal disciplinary measures, the availability of injunctive relief, and damages suits. With these mechanisms already in place, and no evidence to demonstrate that they are not working reasonably well, any increased benefit to be derived from application of the exclusionary rule cannot justify the heavy costs previously described.

In sum, the court of appeals has reached out for the most severe "remedy," in the absence of any proof of a problem requiring correction or amenable to correction by such means, and in the face of overwhelming costs that cannot be ignored. The court utterly failed to provide the justification required for the "drastic measure" (*Janis*, 428 U.S. at 459) it has imposed on the immigration system.

ARGUMENT

THE EXCLUSIONARY RULE SHOULD NOT BE EXTENDED TO CIVIL DEPORTATION PROCEEDINGS

A. The Exclusionary Rule Is A Remedy Of Last Resort And Should Not Be Extended To An Entirely New Class Of Cases Absent Persuasive Evidence That Such A Severe Measure Is Required

1. Before undertaking the now familiar cost-benefit analysis employed by the Court when it considers the appropriateness of applying the exclusionary rule to particular categories of cases,[9] it is well to bear in mind that there are certain fundamental distinctions between the situation now before the Court and previous cases in which the Court has considered the need for the exclusionary rule. Not since *Mapp* v. *Ohio*, 367 U.S. 643 (1961), in which the Court held that the exclusionary rule enunciated in *Weeks* v. *United States*, 232 U.S. 383 (1914), was equally applicable to state criminal prosecutions, has the Court extended the rule to an entirely new

[9] See generally Brief for the United States at 34-38, *United States* v. *Leon*, cert. granted, No. 82-1771 (June 27, 1983) (argued Jan. 17, 1984). We have furnished respondents' counsel with copies of that brief.

class or category of cases.[10] The situation confronting the Court in *Mapp* was, however, markedly different from the situation now before the Court. Not only did the facts in *Mapp* show a particularly flagrant violation

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[10] Respondents' contrary contention notwithstanding (see Br. in Opp. 18), the question presented in this case is the "extension" of the exclusionary rule to deportation proceedings, rather than its "retention" in such proceedings. Although some courts have assumed that the rule always has applied to deportation proceedings, in fact the issue has received virtually no administrative or judicial attention in the past. In *Matter of Sandoval*, 17 I. & N. Dec. at 75 n.7 (J.A. 170), the BIA explained that it "ha[d] not previously intended to reach the issue decided today and withdraws from any language which may be read as suggesting otherwise." The BIA also noted that there were few judicial decisions addressing the issue and none that had engaged in "a detailed analysis of the relative merits of excluding such evidence from deportation proceedings" (17 I. & N. Dec. at 75; J.A. 170). Thus, the BIA determined to give the issue fresh consideration (17 I. & N. Dec. at 75; J.A. 171):

> Accordingly, as the Board has not previously resolved this issue, as we find only one contemporary Federal Court decision in which unlawfully seized evidence is specifically held to be excludable, and as we find no decision in wihch the appropriateness of applying the rule in deportation proceedings is analyzed in detail, we will address the question as one of first impression.

The single federal court decision referred to by the BIA is *Wong Chung Che* v. *INS*, 565 F.2d 166 (1st Cir. 1977). There, without analysis, the court held that the exclusionary rule should be applied in a deportation proceeding to suppress *physical* evidence obtained as a result of an illegal arrest. The court suggested, however, that it would not follow the same rule in the case of oral statements (565 F.2d at 168-169), which are what is at issue in the present cases.

This Court itself clearly has not decided the issue presented today. In *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 155 (1923), the Court stated in dictum that "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings." On the merits, however, the Court rejected Bilokumsky's claim that unlawfully obtained evidence had been used against him (*ibid.*). Moreover, other language in the opinion suggests that the Court would not have invoked the exclusionary rule

of Fourth Amendment rights in an individual case, but, even more importantly, the Court was confronted with the generic conclusion that its decision in *Wolf* v. *Colorado*, 338 U.S. 25 (1949), to entrust to the states the manner of enforcement of the Fourth Amendment's guar-

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even if it had found an illegality (*id.* at 157 (footnotes omitted; citations omitted; emphasis added)):

> So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. * * * *And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application. Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received.* To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process.

And, as the principal dissenting opinion below noted (Pet. App. 54a), this Court later observed, without reference to *Bilokumsky*, that, "[a]ccording to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions." *Abel* v. *United States*, 362 U.S. 217, 237 (1960).

The only other judicial decisions to have confronted squarely the issue now before this Court are *Ex parte Jackson*, 263 F. 110, 112-113 (D. Mont.), appeal dismissed, 267 F. 1022 (9th Cir. 1920), and *United States* v. *Wong Quong Wong*, 94 F. 832 (D. Vt. 1899). As the principal dissenting opinion below explained in considerable detail (Pet. App. 49a-52a), neither of those cases contains any critical analysis of the issue, and certainly neither purports to follow the cost-benefit approach to exclusionary rule questions that this Court has employed for nearly two decades. It is worth noting, however, that *Ex parte Jackson, supra*, rests not on the Fourth Amendment exclusionary rule alone, but instead on a conclusion that the challenged search rendered the deportation proceedings "unfair and invalid" (263 F. at 112) under the Due Process Clause of the Fifth Amendment. As we explain later (see pages 41-42, *infra*), the BIA follows the same approach today to ensure that deportation proceedings are fundamentally fair.

antees had not worked.[11] The Court concluded that the factual considerations that had supported the decision in *Wolf* were no longer valid, noting in particular that, in the intervening years between *Wolf* and *Mapp*, many of the states had voluntarily adopted their own exclusionary rules (367 U.S. at 651). The Court was especially influenced by the experience of California, whose supreme court had been "'compelled [to adopt an exclusionary rule] * * * because other remedies have completely failed to secure compliance with the constitutional provisions . . . .' *People* v. *Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955)" (367 U.S. at 651). The Court added that "[t]he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States" (*id.* at 652).

In short, the Court reached the result it did in *Mapp* as a decision of last resort, and only after concluding that other, less drastic approaches had failed to curb widespread abusive police practices. Here, by way of contrast, there is neither evidence of widespread Fourth Amendment violations by immigration officers nor any indication that those isolated violations that do occur can be materially reduced by adding a suppression remedy to the comprehensive array of alternative training and deterrence mechanisms already in place.

Equally important, the Court in *Mapp* was faced with devising a remedy that would promote conscientious adherence to the Fourth Amendment's commands by every

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[11] In *Wolf*, the Court held that while the guarantees of the Fourth Amendment are enforceable against the states through the Due Process Clause of the Fourteenth Amendment, it was nevertheless "not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective" (338 U.S. at 31). The Court added that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence" (*id.* at 31-32).

state and local police force in the country, from the most sophisticated metropolitan police department to the smallest local constabulary. The cases now before the Court, however, involve the operations of a single federal agency. It is therefore a relatively straightforward task for the Court to determine that the Immigration and Naturalization Service already has adopted all reasonable measures to ensure compliance by its officers with the Fourth Amendment, and that whatever additional deterrence might be achieved by application of the exclusionary rule in deportation proceedings is not worth the associated costs.

2. It is by now clearly established that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States* v. *Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted); see also *United States* v. *Janis*, 428 U.S. 433, 446 (1976); *Stone* v. *Powell*, 428 U.S. 465, 486 (1976); *United States* v. *Peltier*, 422 U.S. 531, 538 (1975). Accordingly, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone* v. *Powell*, 428 U.S. at 486. Instead, application of the rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348; see also *Janis*, 428 U.S. at 447; *Peltier*, 422 U.S. at 538-539. For these reasons, the Court has long engaged in a cost-benefit analysis when it has confronted suggested expansions of the rule.

In our submission, however, this weighing of costs and benefits is not properly performed on scales that are evenly balanced. By excluding unquestionably relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we generally demand of other rules of evidence. See, *e.g.*, C. McCormick, *Handbook of the Law of Evidence* § 72 (E. Cleary ed. 1972). Thus, the rule's benefits should not simply be

presumed; the rule's application to new situations requires more than an assumption that it *might* have the desired deterrent effect. As the Chief Justice observed in his concurrence in *Stone* v. *Powell*, 428 U.S. at 499-500 (emphasis in original; citation omitted):

> To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention—and surely its *extension*—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law. The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade.

See also Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964): "[T]he rule is a needed, but grudingly [*sic*] taken, medicament; no more should be swallowed than is needed to combat the disease."

3. These cautionary notes were sounded in the context of the traditional application of the exclusionary rule to criminal prosecutions. While *Janis* teaches that the same cost-benefit analysis that is applied in criminal cases is appropriate in the civil context as well,[12] it is nevertheless important to bear in mind that, "[i]n the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state." *Janis*, 428 U.S. at 447 (foot-

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[12] In *Janis*, the Court declined to apply the exclusionary rule to bar the use in a federal civil tax proceeding of evidence seized by state law enforcement officials in violation of the Fourth Amendment. Recognizing deterrence as the underlying purpose of the exclusionary rule, the Court compared the costs resulting from application of the rule in the circumstances there presented with the deterrent benefit that could be anticipated and concluded that the expected benefit did not outweigh the societal costs imposed by suppression (428 U.S. at 454).

note omitted).[13] Instead, the Court has stated that "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Calandra*, 414 U.S. at 348 (footnote omitted); see also *Abel* v. *United States*, 362 U.S. 217, 237 (1960).

The purpose of a deportation proceeding, on the other hand, is simply to determine an alien's right to remain in this country. Accordingly, deportation proceedings have long been characterized as civil in nature. See *Woodby* v. INS, 385 U.S. 276, 285 (1966). Deportation is "not a punishment for crime," but rather "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend." *Fong Yue Ting* v. *United States*, 149 U.S. 698, 730 (1893); see also *Mahler* v. *Eby*, 264 U.S. 32, 39 (1924) ("[D]eportation, while it may be burdensome and severe for the alien, is not a punishment."); *Bugajewitz* v. *Adams*, 228 U.S. 585, 591 (1913); *Li Sing* v. *United States*, 180 U.S. 486, 494-495 (1901). Thus, while we do not contend that the civil nature of a deportation proceeding is controlling, it is clearly a relevant factor for the Court to consider in any cost-benefit analysis of the appropriateness of applying the exclusionary rule to deportation proceedings.

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[13] Although the exclusionary rule has been invoked to exclude illegally seized evidence in a forfeiture proceeding, the Court was careful to note that the object of a forfeiture proceeding, like a criminal proceeding, "is to penalize for the commission of an offense against the law." *One 1958 Plymouth Sedan* v. *Pennsylvania*, 380 U.S. 693, 700 (1965). Moreover, "[i]t would be anomalous indeed, * * * to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible" (*id.* at 701 (footnote omitted)). See *Janis*, 428 U.S. at 447 n.17.

4. With these principles in mind, we demonstrate below that the harm resulting from the exclusion of evidence of alienage in deportation proceedings far outweighs any speculative benefit to Fourth Amendment values that could conceivably be obtained through application of the exclusionary rule. Although the court of appeals did employ a cost-benefit analysis, the court went astray in the values it brought to that analysis. As Judge Alarcon's dissenting opinion makes clear (Pet. App. 39a-85a), the majority totally ignored many of the costs of suppression in the deportation context, took a grudging view of the single cost it did consider, and greatly overstated the extent of the incremental deterrence that its decision might promote. More fundamentally, the court of appeals erred in imposing the most drastic possible sanction in the absence of any demonstrated need for such a remedy and in the absence of any persuasive evidence that alternative remedies are inadequate.

B. The Costs Of Applying The Exclusionary Rule To Deportation Proceedings Are Excessive

The societal costs resulting from extension of the exclusionary rule to deportation proceedings are far greater than the court of appeals was willing to acknowledge. The Board of Immigration Appeals detailed those costs in its comprehensive opinion in *Matter of Sandoval*, *supra*. The BIA's analysis clearly reveals that the costs of suppression in the deportation context are higher than our immigration system can afford.[14]

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[14] The BIA's views are, we submit, entitled to substantial deference. By delegation of authority from the Attorney General (see 8 C.F.R. 3.1(a)(1) and (d)(1)), the Board is the agency charged with the interpretation of the immigration laws. As such, it is intimately familiar not only with the laws it interprets but with the practical needs of the immigration system as well. In light of the exclusionary rule's status as a judicially-created remedy (see page 20, *supra*), the BIA's conclusion that the rule should not be extended to civil, administrative deportation proceedings carries great weight. See, *e.g.*, *Miller* v. *Youakim*, 440 U.S. 125, 144-145 n.25 (1979) (quoting *Red Lion Broadcasting Co.* v. *FCC*, 395 U.S. 367,

1. The most obvious result of applying the exclusionary rule in deportation proceedings is that an alien who is not entitled to be in this country may nonetheless remain here indefinitely. *Matter of Sandoval*, 17 I. & N. Dec. at 81; J.A. 178.[15] The effect may be a de facto judicial grant of resident status and immunity from the immigration laws. In contrast, although exclusion of evidence in a criminal proceeding may allow an accused to escape punishment for past crimes, it does not countenance continuation of the illegal conduct in the future.

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381 (1969)) (courts accord great deference to the agency responsible for the day-to-day administration of a statute and should reject that agency's views only if " 'there are compelling indications that [the agency] is wrong' "). Judge Alarcon made the same point in the principal dissenting opinion below (Pet. App. 75a): "[T]he BIA's damage assessment should be compelling, as that court, more so than this one, is in a position to anticipate the cost to the system in which it functions."

[15] The court of appeals' suggestion that this is not a serious cost, because illegal aliens may not be threatening individually or criminally dangerous (Pet. App. 31a), is misguided. This Court has itself noted that, collectively, illegal aliens pose a substantial economic threat to this country and to the citizens and lawful resident aliens against whom they compete for employment. See, *e.g.*, *De Canas* v. *Bica*, 424 U.S. 351, 356-357 (1976) ("Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *."); *United States* v. *Brignoni-Ponce*, 422 U.S. 873, 878-879 (1975) ("[T]hese [illegal] aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services."). Respondents' contention (Br. in Opp. 32 n.14) that illegal aliens "probably benefit the economy" not only runs counter to this Court's pronouncements but also disregards Congress's judgment (in an area in which its powers are " 'more complete' " than any other (*Fiallo* v. *Bell*, 430 U.S. 787, 792 (1977) (citation omitted) that an "open door" immigration policy is contrary to the national interest. Even if respondents' views are sociologically and economically sound, it is for Congress, not the courts, to reexamine the wisdom of the laws providing for deportation of illegal aliens.

The likelihood of a de facto "adjustment of status" is quite real. Contrary to the lower court's facile suggestion that aliens who successfully invoke the exclusionary rule can be reapprehended and deported by the use of untainted evidence (Pet. App. 32a n.21), the matter is not that simple. First, and most obvious, is the fact that once aliens are discharged from a deportation proceeding, they may never be apprehended again. And even if they are, it may well be impossible to prove that the new evidence of their deportability is not tainted by the evidence that has been previously suppressed. Unlike the situation with respect to aliens who overstay their visas, INS has no records concerning the vast majority of aliens who have entered without inspection (see *id.* at 28a). Thus, a reapprehended alien is likely to be known to INS only because of the Service's prior apprehension of him. In the vast majority of cases, as the court of appeals itself appeared to recognize (*id.* at 24a-25a n.13), it is highly unlikely that INS's files will reveal anything about the alien, much less untainted evidence necessary for a new deportation proceeding. As Board Member Farb explained in his concurring opinion in *Matter of Sandoval*, 17 I. & N. Dec. at 85 (emphasis added) (J.A. 183-184):

> For Fiscal Year 1977, the Immigration and Naturalization Service reported that it had located 1,042,000 deportable aliens. Of these, 939,000, or 90%, were listed as having entered without inspection. That means that for the vast majority there was no reason to expect that the Immigration and Naturalization Service records contained prior evidence of their identity as aliens. I am not condoning or encouraging violation of Fourth Amendment rights in the immigration investigator's search for solid proof of identity. If it were done deliberately, discharge from Government service would be appropriate. *I simply don't see how we can reasonably bar the use of illegally obtained convincing proof that a person is an alien with no right of presence, when that may be all that will ever be available to identify him.*

Thus, the practical effect of a suppression order in a deportation proceeding may well be to immunize an illegal alien from ever being deported. Although the court of appeals purported to be ordering suppression only of respondent Sandoval's statements, its judgment reversing the order of deportation was, in reality, akin to suppression of an alien's "body," a result this Court has found unacceptable in criminal cases. See *United States* v. *Crews*, 445 U.S. 463, 474 (1980); see also *id.* at 477 (Powell, J., concurring); *id.* at 478-479 (White, J., concurring). If respondent Sandoval is ever reapprehended, but does not make a new, untainted statement, a second deportation proceeding would likely be terminated as well, resulting in yet another suppression of his "body" and again permitting him to remain in the United States in violation of the immigration laws.

2. A more serious and far-reaching cost is the damage to the administrative and judicial deportation process that will result from merely permitting suppression motions to be brought. The inevitable consequence will be serious interference with the country's ability to expel the vast numbers of illegal aliens who have entered surreptitiously. In *Matter of Sandoval*, 17 I. & N. Dec. at 80 (J.A. 177), the BIA first hypothesized that this cost might be deemed minimal "in view of the fact that since 1899 we can find only two reported cases in which unlawfully seized evidence was in fact excluded from deportation proceedings and only one other case in which the applicability of [the] rule was specifically addressed." Upon closer analysis, however, the BIA found substantial "hidden" costs. First, it described the costs to "the system" (*ibid.* (footnote omitted)):

> Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof. When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of

> the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The result frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony, but the underlying facts [are] not sufficiently developed. The ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result.

And, referring to the realities of immigration practice, the BIA noted (17 I. & N. Dec. at 80; J.A. 178):

> This is particularly true in a proceeding where delay may be the only "defense" available and where problems already exist with the use of dilatory tactics.

Deportation hearings are conducted before a quasi-judicial administrative forum of special and limited function and expertise. Neither the hearing officers nor the attorneys participating in those hearings are ordinarily well-versed in the considerable intricacies of Fourth Amendment jurisprudence. The proceedings are—and are intended to be—essentially summary. See *Zakonite* v. *Wolf*, 226 U.S. 272, 275 (1912). Indeed, given the volume of deportation proceedings, most cannot be anything but summary if the system is to continue to operate.[16] The

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[16] According to the Office of the Chief Immigration Judge, from March 1983 (the first month for which statistics are available) until December 1983, the 55 authorized immigration judges received 70,202 deportation cases and completed adjudication of 51,277; received 6,078 exclusion cases and completed adjudication of 5,125; and received 1,967 motions to reopen and completed adjudication of 1,857. Annualizing these data, the Chief Immigration Judge projects that there will be 69,910 completed adjudications in a one-year period, or 6.3 adjudications *per day* per immigration judge. (In our Petition (at 17 n.10), we projected a rate of 5.35 adjudications per

staggering workload is manageable only because, as the BIA explained in *Matter of Sandoval*, 17 I. & N. Dec. at 80 n.21 (J.A. 177), "in the majority of cases, deportability is conceded and the bulk of the hearing concerns applications for various categories of mandatory and discretionary relief from deportation." Manifestly, any significant instrusion of "complex constitutional controversies" (Pet. App. 75a) will overload the system to the point of breakdown. Hearings that can now be conducted in an hour or less will take a day or more, and decisions that can now be rendered expeditiously will often require sophisticated and time-consuming research and analysis by the immigration judge.

Moreover, it is unrealistic to expect that there will not be a significant increase in the number of suppression motions made in deportation proceedings if the decision below stands. For an illegal alien, "delay may be the only 'defense' available." *Matter of Sandoval*, 17 I. & N. Dec. at 80; J.A. 178. The longer an alien can postpone a final deportation order, the longer he can remain in this country and hope that something will happen to save him from deportation. The decision below thus compounds the problems attendant upon enforcement of the immigration laws by providing illegal aliens who would otherwise lack even a colorable legal defense to deportation with a potent new

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immigration judge per day. That figure was based on certain general assumptions, including a 48-week work year for each immigration judge. The present figure is based on the Chief Immigration Judge's records of time actually worked by each immigration judge and also reflects the fact that until recently not all 55 judgeships were filled.) In addition to the substantive adjudications just noted, immigration judges also handle 16,000 bond hearings each year.

By way of contrast, 6,023 criminal defendants were actually tried in United States District Courts during fiscal year 1982 (*Annual Report of the Director of the Administrative Office of the United States Courts* 141 (1982)) by 484 district judges (*id.* at 34). This averages out to 12.44 criminal trials *per year* per judge.

strategy for delay.[17] It is not surprising that the immigration bar has quickly latched on to the decision below by increasingly asserting Fourth Amendment claims in suppression motions. In INS's Western Region, which encompasses the States of Arizona, California, Hawaii, and Nevada (see 8 C.F.R. 100.4), a dramatic increase in suppression motions is already apparent. The decision below was rendered on April 25, 1983 (Pet. App. 1a). In the year preceding the decision, INS advises us that 141 suppression motions were filed in deportation proceedings within the Western Region.[18] In the seven months following the decision (from June 1, 1983, through December 31, 1983), INS advises us that 342 suppression motions have been filed in the Western Region.[19] Assuming that such motions continue to be filed at a constant rate for the remainder of the first year following the decision below—undoubtedly a conservative assumption—a total of 586 such motions will be filed, in contrast to the 141

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[17] Respondents were arrested on August 3, 1976 (Lopez) (J.A. 15), and June 23, 1977 (Sandoval) (J.A. 162), and both are still in this country because of their Fourth Amendment claims.

[18] These motions were filed between June 1, 1982, and May 31, 1983. This time period was selected for examination because it allowed a one-month "percolation" period for the practicing bar to learn of the court of appeals' decision.

[19] Prior to January 16, 1984, INS did not keep written records of the number of suppression motions filed in deportation proceedings. The number of motions filed in the year preceding the court of appeals' decision and the number filed in the seven months thereafter, noted above in text, were derived from a variety of sources, including examination of open case files, pending appellate briefs before the BIA, and the reconstructive efforts of INS's trial attorneys. The trial attorneys were instructed not to count any case about which they were not absolutely certain. Although the numbers supplied in text thus represent estimates, INS has a high degree of confidence in their accuracy. In addition, the reliability of the estimates is borne out by the one month of written records that INS does have. Between January 16, 1984, and February 15, 1984, 53 suppression motions were filed in deportation cases in the Western Region. This corresponds closely to the estimate that 342 such motions were filed in the seven months following the court of appeals' decision.

motions filed in the year before the decision. Although it is still too early to know the disposition of most of these motions, the indications to date support the hypothesis that they are filed merely for purposes of delay, and not because they have any intrinsic merit. In the San Francisco District Office, for example, we are advised that 100 suppression motions have been filed since the decision below, 30 of those motions have been decided by immigration judges (the first level of the deportation process), and only one motion has been granted.

Moreover, the problem of delay introduced by suppression motions does not cease with the deportation hearing. Although it is too early for the increase in suppression motions to have affected the workload of the BIA or the courts of appeals, it requires little speculation to predict that illegal aliens whose suppression motions are denied by immigration judges will appeal to the BIA and from the BIA to the courts of appeals. Indeed, the federal courts have frequently expressed exasperation at the seemingly endless procedural maneuvering of illegal aliens. See, *e.g.*, *Der-Rong Chour* v. *INS*, 578 F.2d 464, 467-468 (2d Cir. 1978); *Ballenilla-Gonzalez* v. *INS*, 546 F.2d 515, 521 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977) ("[O]ur government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure as long as possible."). During the several years while administrative and judicial appeals from the denial of suppression motions are pending, of course, aliens will be able to remain here notwithstanding the complete absence of any claim of lawful right to be in the United States.[20]

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[20] A particularly ironic example of the potential for delay inherent in suppression motions is *Montero* v. *Ilchert*, No. C-84-0470 (N.D. Cal. filed Jan. 31, 1984). Petitioners in that case were found deportable by an immigration judge, but they were granted the privilege of voluntary departure and permitted five months in which to leave the country. At the end of the five months, petitioners filed

Thus, it is not far-fetched to predict, as the dissent suggested (Pet. App. 72a-73a), that a considerable number of aliens who have hitherto waived hearings and accepted voluntary departure will now assert their right to a hearing solely in order to file such motions.[21] Not only would these motions add yet another significant source of delay to the deportation process, but they are likely to add substantially to the burdens of the courts that must review such proceedings, as well as leading to the grant of indefinite stays to aliens not entitled to be in this country (see pages 24-26, *supra*). These results we submit, would deal a grave blow to the enforcement of the immigration laws.

3. There is yet another cost of applying the exclusionary rule to deportation proceedings, one whose impact upon enforcement of the immigration laws could considerably outweigh all other costs, substantial as they are. The practical effect of the court of appeals' decision will be to

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a motion to reopen their deportation proceedings, alleging that they had been denied effective assistance of counsel because their lawyer—the same attorney who represented respondent Lopez in the instant case—had failed to file a suppression motion in the deportation proceedings. The immigration judge and INS's district director denied petitioners' motion for a stay of deportation pending further proceedings on the motion to reopen. On February 16, 1984, the district court granted the petition for habeas corpus filed in *Montero*, finding that INS had abused its discretion in denying a stay of deportation pending further inquiry into petitioners' claim of ineffective assistance of counsel.

[21] As an indication of the universe from which additional assertions of the right to a hearing may come, the Border Patrol apprehended 1,106,683 deportable aliens in fiscal year 1983. The projected figures for 1984 and 1985 are 1,262,000 and 1,500,000 apprehensions, respectively (OMB, Exec. Off. of the President, *Budget of the United States Government—Fiscal Year 1985: Appendix*, H.R. Doc. 98-139, 98th Cong., 2d Sess., at I-N16 (1984)). Even at the rate of 6.3 adjudications per immigration judge per day, only 69,910 adjudications will be completed in the one-year period between March 1983 and February 1984 (see pages 27-28 note 16, *supra*). Thus, the ability of the system to function obviously depends on the fact that only a small fraction of apprehended illegal aliens exercise their right to a hearing, as well as the fact that most hearings are relatively brief and uncomplicated.

require substantial modification of the enforcement techniques that have proven to be the most effective in apprehending illegal aliens. As noted earlier, immigration officers apprehend over one million deportable aliens per year. To ensure effective allocation of the agency's limited investigative resources, INS's policy in areas away from the border is to utilize those investigative procedures, such as factory and farm surveys, that are likely to enable a relatively small number of agents to make large numbers of essentially simultaneous apprehensions. See Brief for the Petitioners at 3-5 & n.3, *INS* v. *Delgado*, cert. granted, No. 82-1271 (Apr. 25, 1983) (argued Jan. 11, 1984). (We have furnished respondents' counsel with copies of our brief in *Delgado*.) One of the factory surveys at issue in *Delgado*, for example, resulted in essentially simultaneous arrests of 78 illegal aliens out of some 300 employees (*id.* at 5). In light of the large number of arrests that an individual officer may make in a single day and the inevitable time lag between the arrest and a deportation proceeding, his recollection of the circumstances of a particular arrest, and even of a particular group of arrests on a single day, will understandably fade with time. Indeed, it seems unlikely that an officer who may have arrested a dozen or more people in the span of a few hours could accurately recollect the facts pertinent to the arrest of each alien even if the deportation hearing were held immediately following the arrests.[22] But if probable cause for a particular arrest or reasonable suspicion for a stop is to be made an issue in deportation proceedings, INS will find it necessary as a matter of

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[22] Added to this is the subtlety and complexity of the Fourth Amendment analysis applicable to these situations, involving initial observations of behavior, contacts between officer and alien that may or may not amount to a Fourth Amendment seizure, and the further development of the interaction leading ultimately to an arrest. One need only look to the same type of issue as it has emerged in the airport drug surveillance cases to appreciate how detailed and subtle the inquiry at a suppression hearing is likely to be. See, *e.g.*, *Florida* v. *Royer*, No. 80-2146 (Mar. 23, 1983).

litigative precaution to require its officers to compile detailed, contemporaneous, written reports recording the circumstances of each individual arrest.[23] Even if it be assumed that substantial numbers of illegal aliens will continue to depart voluntarily without a hearing, INS agents still would have to make individualized arrest records because they could not know in advance *which* aliens would exercise their right to a hearing. Manifestly, the time consumed in executing detailed, on-the-spot arrest reports will dramatically reduce the number of arrests that can be made.

In addition, it is rarely if ever necessary for the arresting officer to attend the typical deportation hearing, at which deportability is conceded and the only issue is discretionary relief. The officer's only necessary contribution already has been made by completing the I-213 "Record of Deportable Alien" that is introduced to prove the government's case at the deportation hearing. Once suppression becomes an issue, however, the officer must not only be in a position to recount the details of each arrest, but he must also take time away from his regular duties to testify at the suppression hearing. Thus, a certain number of days each month that would otherwise be devoted to the apprehension of deportable aliens will instead be devoted to testifying at suppression hearings. As we demonstrate below, these diversions of INS's limited investigative resources cannot be justified.

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[23] Although we have not sought this Court's review of the court of appeals' Fourth Amendment ruling in Sandoval's case, it is worth noting how much emphasis the court placed on the fact that Agent Bower could not be "absolutely positive" (J.A. 136) that he himself had questioned Sandoval (see Pet. App. 5a-7a). There is of course a considerable difference between an actual absence of probable cause to arrest (which we do not concede in these cases) and an agent's inability to recall the exact circumstances of any particular arrest. See pages 35-36, *infra*.

C. There Is Neither A Demonstrated Need For The Sanction Of The Exclusionary Rule In Deportation Proceedings Nor A Realistic Possibility That It Would Produce Meaningful Incremental Deterrence

Even in the criminal context for which the exclusionary rule was first devised, this Court has noted the lack of reliable empirical evidence to support the proposition that the exclusionary rule operates effectively to deter police misconduct. See, *e.g.*, *Stone* v. *Powell*, 428 U.S. at 492 & n.32; *Janis*, 428 U.S. at 449-453; *Elkins* v. *United States*, 364 U.S. 206, 218 (1960); *Irvine* v. *California*, 347 U.S. 128, 136 (1954). Instead, the Court has accepted as intuitively plausible the premise that suppression in a criminal trial is likely to some extent or in some circumstances to deter police officers from committing Fourth Amendment violations. Whatever the validity of that assumption in the context of criminal investigations, it clearly is far less plausible in the context of immigration enforcement. Moreover, the court of appeals itself acknowledged (Pet. App. 28a) that there is no evidence of widespread Fourth Amendment violations by immigration officers; nevertheless, it reached out to apply the exclusionary rule to all deportation proceedings in the future. This rush to judgment, in the absence of convincing evidence of need, cannot be squared with the much more cautious approach taken by this Court to suggested expansions in the scope of the exclusionary rule.

1. The absence of a demonstrated need to invoke the exclusionary rule is particularly striking here, where it is not at all clear that any Fourth Amendment violations actually occurred. In respondent Lopez's case, the Fourth Amendment issue has yet to be determined, but the administrative record seems quite adequate to demonstrate that an admission of alienage was made during a non-seizure encounter, and accordingly that there was no violation's of Lopez's Fourth Amendment rights.[24] Yet the

[24] It is debatable whether the agents' continued presence on the premises at the time of their conversation with Lopez violated

result of the court of appeals' ruling is that a known illegal alien who was apprehended nearly eight years ago is given another round of hearings, to be followed by the inevitable appeals, that will allow him to remain in this country for several more years. And in respondent Sandoval's case, the most that can be said is that the court of appeals *presumed* that the Fourth Amendment had been violated because Agent Bower could not recall the precise circumstances surrounding Sandoval's detention and arrest. But as noted by Judge Poole in dissent (Pet. App. 92a), the record in Sandoval's case, fairly read, reveals that the only aliens transported to the police station were those who admitted their unlawful alienage at the plant. If Agent Bower had been able to testify that he specifically recalled Sandoval's having made such an admission, clearly there would have been probable cause to arrest (see page 38 note 23, *supra*). Application of the exclusionary rule to a case like Sandoval's, therefore, is not likely to "deter" official misconduct, since it appears that none in fact occurred. Instead, the result will be limited to undermining lawful and effective investigative techniques, thereby severely interfering with enforcement of the immigration laws (see pages 31-33, *supra*). Thus, even conceding the validity in general of the deterrence rationale and its potential applicability to INS agents, the exclusionary rule is not likely to perform its desired function in the type of case here presented.

It is well to keep in mind in this connection the contrast betwen the practical circumstances surrounding the decision to stop or arrest and the legal rules governing adjudication of suppression motions. A majority of arrests of illegal aliens away from the border occur during farm, factory, or other workplace surveys. See Brief for the Petitioners at 3-4 & n.3, *INS* v. *Delgado*, *supra*. As is evident from the record regarding the circumstances attending the arrest of respondent Sandoval,

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the rights of the proprietor, but that issue is immaterial to Lopez's claim for suppression.

a single workplace survey can result in the apprehension of large numbers of illegal aliens, occurring under conditions that can only be described as chaotic. In order to safeguard the rights of individuals present at such surveys, some of whom may be citizens or lawfully present aliens, INS has developed various rules restricting stop, interrogation, and arrest practices. See, *e.g.*, *id.* at 7 n.7, 32-40 & n.25. There is no evidence that INS agents do not generally abide by these regulations, or, indeed, that they did not do so in these cases.

But when it comes time to conduct a suppression hearing the burden is placed upon the government to prove as to each individual alien that the discovery of his or her illegal status was not tainted by an illegal stop or arrest. Cf. 3 W. LaFave, *Search and Seizure* § 11.2, at 499 (1978). Given the often large number of illegal aliens arrested in the frequently chaotic circumstances surrounding a factory or farm survey, reconstruction of the particular observations that prompted the agents to detain or arrest each individual is indeed an awesome, if not impossible, task. The agents can testify that they follow the general rules—*i.e.*, that they do not detain anyone without reasonable suspicion of illegal alienage and that they do not arrest anyone unless there is an admission of illegal alienage or other strong evidence thereof—but plainly the Ninth Circuit, at least, is unwilling to rely upon such general testimony or upon any presumption of regularity to sustain the lawfulness of the stop or arrest. It prefers instead to rely on a presumption of illegality that must be rebutted by detailed, specific, individualized proof of the circumstances of the arrest.

The result of this combination of factual and legal circumstances—so different from the focused investigative activities usually under scrutiny in a suppression hearing in a criminal case—is that there will usually not in fact have been any Fourth Amendment violation attendant upon the securing of the admissions of illegal alienage upon which deportability frequently depends,

yet it will often be impossible to prove this with the required degree of individualized specificity. Application of the exclusionary rule to deportation proceedings will thus result principally in the exclusion of *lawfully* obtained evidence—as most probably has happened in respondent Sandoval's case. But if the suppression sanction is to be applied mainly to lawful actions of immigration officers, it plainly will be a completely ineffective means of deterring misconduct.

2. It is of course true that immigration officers are in the business of conducting searches for and seizures of illegal aliens for the purpose of bringing about their deportation. And, being human, they inevitably will make mistakes on occasion, no matter how carefully trained and how well intentioned they may be. Moreover, as the court of appeals noted (Pet. App. 23a-24a), while the investigative activities of the police are likely to culminate in a criminal trial, those of INS agents are directed primarily toward deportation. On the basis of these observations, the court of appeals concluded that extension of the exclusionary rule to deportation proceedings can be expected to have the same deterrent impact on illegal searches and seizures by INS agents as its current application in criminal trials is presumed to have on criminal investigators. This assumption simply fails to pass scrutiny.

First, as discussed in the preceding point, the nature of INS investigative activities is materially different from typical police investigations, so that it is normally a great deal more difficult to determine reliably whether the arrest of an alien resulted from a Fourth Amendment violation than to make the same determination in the case of the arrest or search of a criminal suspect. But the effectiveness of the suppression sanction very much depends on the ability of the courts to apply it consistently to illegal conduct and *only* to illegal conduct. Frequent application of the sanction to conduct that was not illegal can only sow confusion, not teach a meaningful corrective lesson.

Even were it possible to apply the sanction with surgical precision in deportation proceedings, critical differences betwen INS and conventional police activities remain that make it most unlikely that extension of the exclusionary rule to deportation proceedings will provide a meaningful incremental deterrent to misconduct. For example, the sheer volume of arrests made by an individual immigration officer not only presents the practical problems already discussed, but it also greatly reduces the likelihood that suppression in any individual case will have great impact on the officer. INS informs us that an immigration officer averages 489 arrests of deportable aliens each year. By way of contrast, each field agent of the Drug Enforcement Administration arrests an average of 8 persons per year. It may be quite reasonable to assume that the possibility that one of his eight arrests might not be successfully prosecuted because of his own misconduct is likely to play some part in the DEA agent's thinking. For the immigration officer, on the other hand, the possibility that one or even several aliens will not be deported because of the exclusionary rule, when hundreds more will, cannot possibly have a comparable impact.

Moreover, the incentives to gather crucial evidence are obviously strongest in a serious criminal investigation. As the incentives to gather evidence increase, it may be logical to assume that the need for external disincentives to illegal conduct, such as the exclusionary rule, become stronger. In the immigration context, however, where considerably less is at stake in each individual case, there is correspondingly less incentive to engage in overzealous law enforcement practices. By the same token, officers know that the great majority of deportable aliens they arrest will not demand deportation hearings in any event, thereby greatly diluting the potential deterrent from application of the exclusionary sanction in those proceedings.[25] Thus, application of the exclusionary rule in de-

[25] As the court of appeals noted (Pet. App. 29a n.17), fewer than 2.5% of the deportable aliens apprehended each year exercise their

portation proceedings is unlikely to have any significant behavioral impact on the practices of immigration officers. Instead, this is a situation in which internal constraints, discussed below, are likely to be much more effective.

D. The Court Of Appeals Failed To Give Sufficient Weight To The Availability Of Other Means To Reduce Or Discourage Fourth Amendment Violations

The court of appeals cavalierly dismissed the utility of less drastic remedies for Fourth Amendment violations committed by INS officers. In the circumstances of this case, in which the court was forced to acknowledge that there is no record of widespread violations to be deterred, the court clearly erred. The alternatives are many, and, either singly or in combination, there is no reason to suppose that they are inadequate or that the addition of a suppression remedy will provide a meaningful increment of control over potential illegal conduct. The existing alternatives include comprehensive legal training for immigration officers, an administrative practice of excluding evidence seized through intentionally or flagrantly unlawful conduct, effective internal discipline, the availability of declaratory or injunctive relief, and damages suits.

1.a. New immigration officers go through extensive training in a variety of subjects. A new officer's first 18 weeks with INS are spent at the Border Patrol Academy in Glynco, Georgia. There, he is required to take 126 hours of study in the Law Program, which includes instruction in all aspects of Fourth Amendment and statutory law affecting the work of immigration officers. He must pass the final examination in the Law Program with a grade of at least 70; failure to attain that grade

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right to a formal hearing. Although we have explained (see pages 26-31, *supra*) the systemic damage that would result from even a small increase in the number of aliens requesting hearings, the fact remains that the individual officer still would know that most of his apprehensions would not lead to hearings, thereby diluting the potency of the suppression sanction.

results in immediate separation from the Border Patrol. Following his training at the Academy, the officer remains in a probationary status for the remainder of his first year with the Border Patrol. He is assigned to a field office, where he spends one full day per week in formal classroom instruction in law and Spanish, under the supervision of a Training Officer specially assigned to him. During the rest of the week, he is assigned to work under the supervision of experienced (journeymen) officers on rotating shifts so as to obtain a broad range of field experience. After he has been with the Border Patrol for approximately six months, he is required to take another pass/fail examination in law; again, failure to achieve a grade of at least 70 results in immediate separation. Even after passing his six-month examination, he remains in training as before, continuing to take formal classroom instruction one day per week. Ten months after joining the Border Patrol, he takes a final examination in law, on which he must again receive a passing grade of 70. At the end of his first year with the Border Patrol, he is promoted to journeyman status if he has passed all his examinations and been recommended for promotion by the supervisory officers under whom he has worked.

Journeymen officers return to the Border Patrol Academy periodically for refresher courses in the law. In addition, INS's Office of General Counsel sends out teletypes to all field offices advising them of new court decisions that affect their work as soon as notice of the decisions is received. These teletypes are read to the officers at roll call each day, so that officers are informed as rapidly as possible of new legal requirements. In short, INS does everything reasonably possible to ensure that its officers are well-versed in the requirements of the Fourth Amendment.

b. A fact overlooked by the court of appeals is INS's general policy of erring on the conservative side when confronted with questionable search and seizure issues. INS has instructed its officers as follows (INS, U.S.

Dep't of Justice, *The Law of Arrest, Search, and Seizure for Immigration Officers* at iv (Jan. 1983)):

> Many of these areas of the law are in flux and have not yet been settled by the Supreme Court. * * * In these areas, the Service sometimes adopts a nationwide policy which does not test the limit of the law or the Constitution but is in conformity with one or more lower court decisions. * * * The reasons for adopting this policy are the following:
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> * * * * *
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> (2) *Protection of officers and the agency.* If our policy is somewhat more restrictive than the Constitutional limit, or if it does not test that limit where that limit has not yet been determined by the Supreme Court, our officers are less likely to be involved in litigation over alleged violations of persons' Constitutional rights (*Bivens* suits). Also, such suits are less likely to be brought, saving the Department, the agency, and the individual employee the expense, time, and anguish which such litigation entails.
>
> (3) *Image.* By conforming our actions nationwide to the requirements laid down by lower courts and not always exercising our authority to its very limits and testing those limits, a higher proportion of our contacts with citizens and lawful permanent residents will be in a non-confrontation setting. We should therefore be able to demonstrate to the public, the courts, and the media that the agency acts reasonably and with commendable restraint in the face of overwhelming enforcement responsibilities.

2. The Department of Justice requires that evidence seized through intentionally unlawful conduct be excluded, as a matter of policy, from the proceeding for which it was obtained.[26] In addition, the BIA has held,

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[26] This policy arose out of former Attorney General Civiletti's consideration of the BIA's decision in *Matter of Sandoval, supra.* The Attorney General had been requested to review the Board's decision in that case pursuant to 8 C.F.R. 3.1(h), which reserves to the Attorney General discretionary authority to review any BIA

subsequent to its decision in *Matter of Sandoval, supra*, that evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render admission of the evidence thereby obtained "fundamentally unfair" and in violation of "the fifth amendment's due process requirement * * *." *Matter of Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980). Similarly, in *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980), the Board suppressed an admission of alienage obtained after the alien's requests to speak to his attorney had been repeatedly refused and he had been held incommunicado for a significant period of time. Because the unlawfully obtained admission was the only evidence of deportability, the BIA ordered the deportation proceeding terminated (*ibid.*). The Board reached the same result in *In re Ramira-Cordova*, No. A21-095-659 (BIA Feb. 21, 1980), after concluding that the only evidence of deportability was obtained as a result of a middle-of-the-night, warrantless entry into the aliens' residence.

The Board's approach represents a balanced response to the problem of Fourth Amendment violations committed by INS officers. As the Board recognized in *In re Ramira-Cordova, supra*, evidence of deportability should be admitted so long as it is probative and its use funda-

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decision. After consideration by the Department's Office of Legal Counsel and members of the Attorney General's staff, the Attorney General decided not to review the BIA's decision, concluding that it was correct as a matter of law and in conformity with existing Department policy. Nevertheless, the Attorney General took the opportunity to clarify the Department's internal policy with respect to Fourth Amendment violations. The result was a directive forbidding the use of evidence seized through intentionally unlawful conduct and providing that employees who commit such violations are to be subjected to the most severe administrative penalties available. The directive also addresses reckless and negligent violations of the Fourth Amendment and establishes appropriate disciplinary sanctions for such violations. See Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, *Violations of Search and Seizure Law* (Jan. 16, 1981). (A copy of this memorandum has been lodged with the Court and served on counsel for respondents.)

mentally fair. See also *Martin-Mendoza* v. *INS*, 499 F.2d 918, 921 (9th Cir. 1974) ("The tests for admissibility [in deportation proceedings] are fundamental fairness and probativeness."). Not every Fourth Amendment violation (or, as in respondent Sandoval's case, not every presumed Fourth Amendment violation) necessarily requires a finding that the admission of evidence thereby obtained would render the proceedings fundamentally unfair. In light of the costs to the immigration system previously described, the Board's approach clearly represents a reasonable reconciliation of competing interests, and it should be endorsed by this Court.

3. As described in the principal dissenting opinion (Pet. App. 78a-81a), INS has a "comprehensive procedure" for investigating and punishing immigration officers who commit Fourth Amendment violations. "[W]hether or not any civil or criminal proceedings are commenced" against such an officer, "he may be subject to agency disciplinary action with possible penalties ranging from an official letter of reprimand to removal from his job, which may bar him from future federal employment." INS, U.S. Dep't of Justice, *The Law of Arrest, Search, and Seizure for Immigration Officers* 35 (Jan. 1983) (footnote omitted). All INS employees are required to "report[] immediately" any allegations of misconduct directed against other employees, and failure to report such allegations, or even delay in reporting them, "may result in disciplinary action against [nonreporting] employees." *INS Operations Instructions* ch. 287.10(e) and (g), at 4723, 4730 (1978). The pendency of an allegation of misconduct "made by, on behalf of, or involv[ing] an alien" requires the immediate suspension of any action "to enforce the departure from the United States of either the alien or of any witnesses involved until a preliminary inquiry or an investigation of the matter has been completed" (*id.* ch. 287.10(f)(5), at 4730). Thus, no alien

may be deported while his charges of a Fourth Amendment violation are under investigation.[27]

As the principal dissent recognized, the panoply of INS disciplinary measures is impressive and deserving of deference from the courts (Pet. App. 80a):

> It is readily apparent from reviewing the Immigration and Naturalization Service's disciplinary procedure that a sincere effort is being made to deter and punish search and seizure violations. A police officer who conducts an unreasonable search and seizure may suffer anguish when a criminal defendant goes free because of the blunder. He does not, however, face the immediate prospect of unemployment as a result of the exclusion of illegally seized evidence. An immigration officer on the other hand, faces loss of his job and denial of future federal employment if he conducts an illegal search and seizure. These stern consequences should serve as a far greater deterrent to improper conduct than the possibility that deportation proceedings against an alien may be dismissed. No evidence has been cited to this court that these harsh disciplinary measures proved ineffective.

The majority dismissed these procedures, which it nevertheless described as "commendable," because it had "no evidence whatsoever that the guidelines are being consistently and effectively enforced" (Pet. App. 35a). The majority's approach was backward—it should have ascertained that the disciplinary procedures are *not* capable of controlling any tendency immigration officers might other-

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[27] Significantly, however, the "stay" of deportation that may accompany INS's investigation into a charge of misconduct does not result in the substantial delays associated with suppression motions. INS's disciplinary procedures contain strict time limits for the completion of investigations. Preliminary inquiries, which may be all that are required to resolve many cases, must be completed within 10 working days. *INS Operations Instructions* ch. 287.10(j)(3), at 4733-4734 (1978). More detailed investigations must be completed within 60 days, and extensions of time may be granted only for "compelling" reasons (*id.* ch. 287.10(*l*), at 4737-4738).

wise have to violate Fourth Amendment rights before rejecting them as inadequate.[28] This is especially true in light of the majority's own confessed inability to explain why "immigration officers have not committed many Fourth Amendment transgressions * * *" (Pet. App. 28a). Although the majority opined that "[o]ne plausible explanation" (*ibid.*) for the paucity of such violations was the presumed applicability of the exclusionary rule to deportation proceedings prior to the BIA's decision in *Matter of Sandoval*, *supra*, the majority offered no explanation, plausible or otherwise, for the equally low incidence of Fourth Amendment transgressions in the post-*Sandoval* period (1979-present). This fact alone should have sufficed to demonstrate that the addition or elimination of the suppression sanction has little incremental impact on the officers' compliance with Fourth Amendment standards.

Moreover, the majority accepted the premise (Pet. App. 34a) that self-policing is the most effective deterrent—and therefore the preferred remedy—because it offers the most direct and immediate feedback to the offending officer. Having accepted that premise, the court should not then have "ignore[d] the possibility that a rigid application of an exclusionary rule * * * could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures." *United States* v. *Caceres*, 440 U.S. 741, 755-756 (1979) (footnote omitted). As the Court emphasized in *Caceres*, when "the Executive itself has provided for internal sanctions * * *, [t]o go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations"

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[28] In fact, INS's disciplinary rules are not mere paper procedures. INS advises us that in the preceding four fiscal years, 20 officers have been suspended or terminated for misconduct affecting aliens. These infractions have come to light both by virtue of reports made by fellow officers and complaints filed by aliens.

(*id.* at 756). In other words, to require exclusion in every civil deportation proceeding in which a Fourth Amendment violation is shown would undermine what the majority concedes to be the most effective deterrent—self-policing. Given the complete lack of evidence to show that INS's internal disciplinary sanctions are not effective, there was no basis for the court's decision to undermine those internal sanctions by imposing an absolute exclusionary rule in civil deportation proceedings. At the very least, the existence of "commendable" internal sanctions counsels strongly against the creation of an additional "remedy," cf. *Bush* v. *Lucas*, No. 81-469 (June 13, 1983), in the absence of specific evidence of the ineffectiveness of the internal sanctions.

4. Declaratory or, if necessary, injunctive actions offer especially appropriate vehicles for correcting any institutional practices that might violate Fourth Amendment rights. Unlike the criminal field, in which there are hundreds or thousands of separate police forces, there is only one Immigration and Naturalization Service, and declaratory relief directed against the Service will, if necessary, be effective.

The majority rejected the utility of prospective injunctive relief on the theory that such relief "is generally available only after broad scale violations that result from official policy, and is rarely, if ever, effective to deter violations that result not from official policy but from an individual officer's overzealousness" (Pet. App. 34a). Assuming, arguendo, that the majority's premise is correct, it overlooks the fact that, for reasons of economy, INS does not generally waste scarce investigative resources by sending individual officers out in search of individual aliens. Rather, as explained in our brief in *INS* v. *Delgado*, *supra* (at 3-4 & n.3), factory surveys are the most effective means of detecting illegal aliens who have eluded the Border Patrol. During 1982, for example, factory surveys accounted for approximately 60% of all illegal aliens apprehended by INS in nonborder locations.

Thus, an injunctive action such as that brought by the *Delgado* respondents is clearly an effective means for determining the validity of an INS practice that affects large numbers of aliens. See also *Illinois Migrant Council* v. *Pilliod*, 540 F.2d 1062 (1976), modified on reh'g en banc, 548 F.2d 715 (7th Cir. 1977) (enjoining INS practice of questioning individuals simply on the basis of their Mexican ancestry or Spanish surnames).

If a recurring pattern of "overzealousness" by individual INS agents is ever demonstrated by actual cases, there will be time enough to devise an appropriate remedy. As we have shown, however, neither of the cases now before the Court involves any such problem. Thus, the court of appeals' out-of-hand rejection of injunctive and declaratory actions as effective deterrents was especially inappropriate here.

5. Finally, the majority erred in totally dismissing the utility of *Bivens* actions [29] as a deterrent tool. We do not disagree with the majority's observation (Pet. App. 33a) that those illegal aliens who have been deported are unlikely to bring many *Bivens* suits.[30] But the majority completely overlooked the fact that citizens or lawful aliens subjected to illegal searches or seizures can be expected to bring such actions,[31] and the deterrence thereby

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[29] *Bivens* v. *Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

[30] It is worth noting, however, that *Bivens* suits have become yet another tool in illegal aliens' never-ending quest for delay. In *Ortega* v. *Rowe*, CA No. 5-81-198 (N.D. Tex. filed Dec. 9, 1981), three illegal aliens, representing a class of illegal aliens who might be arrested by the Border Patrol in Lubbock, have brought a *Bivens* suit claiming that they have been abused by Border Patrol agents and challenging the conditions of confinement at the jail where the named plaintiffs have been held. The district court granted the motion of the named plaintiffs for a stay of deportation so that they would not be separated from their attorneys during the pendency of their *Bivens* suit.

[31] Several such actions are pending. See, *e.g.*, *Cervantez* v. *Whitfill*, C.A. No. 2-79-206 (N.D. Tex. filed Dec. 12, 1979) (*Bivens* action

gained would naturally extend to the future benefit of all persons.

Moreover, the deterrence to be expected from *Bivens* actions does not logically depend on the number of such cases actually filed. Even if successful *Bivens* suits are relatively rare, the mere prospect of such suits being brought is a powerful disincentive to unlawful conduct. It defies common sense to suppose that fear of a suit against an immigration officer in his individual capacity, in which he is faced with the possibility of personal liability, has no influence on his conduct. As this Court has recognized, "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow* v. *Fitzgerald*, 457 U.S. 800, 814 (1982) (brackets in original) (quoting *Gregoire* v. *Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)).

The threat of *Bivens* actions can be expected to be a particularly effective deterrent for immigration officers. As we have noted, immigration officers arrest deportable aliens in such large numbers that their interest in any particular alien's deportation, and hence their incentive to engage in unlawful conduct, is extremely low. Under these circumstances, in which an immigration officer can make hundreds of arrests with very little effort, there is simply no reason for him to risk personal liability through overzealous conduct in any individual case. Thus, the *Bivens* deterrent is in fact substantial, and the court of appeals should not have rejected it.

6. In sum, the societal costs of extending the exclusionary rule to deportation proceedings are enormous and

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by legal aliens and citizens alleging unlawful arrest and detention); *Ramirez* v. *Webb*, No. K-81-344-CA8 (W.D. Mich. filed Sept. 4, 1981) (*Bivens* action brought on behalf of Hispanic surnamed persons alleging unlawful detention and arrest).

Moreover, almost as a matter of definition, a majority of persons arrested without probable cause or detained without reasonable suspicion will not be illegal aliens. Consequently, illegal aliens constitute a minority of potential *Bivens* plaintiffs.

plainly outweigh any incremental increase in deterrence of illegal conduct by enforcement officials. This country is in an immigration crisis, with, as the court of appeals noted, between 3½ and 12 million illegal aliens already here and over 500,000 more entering every year (see Pet. App. 29a). The injection of complex constitutional questions into the immigration administrative hearing process, in which each immigration judge is currently making more than six adjudications per day (see pages 27-28 note 16, *supra*), could bring an already dangerously over-burdened system to a virtual halt. Extension of the exclusionary rule to civil deportation proceedings, the result of which could be to allow illegal aliens to perpetuate their presence in this country in violation of our immigration laws, thus seriously jeopardizes the Executive's ability to control illegal immigration. *Janis* makes clear that those who seek the extension of the exclusionary rule must demonstrate "sufficient justification for [that] drastic measure" (428 U.S. at 459). No such justification exists here.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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